STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

TDS Metrocom, LLC	**)**	
-vs-	**)**	
Illinois Bell Telephone Company	**)**	
	)	**03-0553**
Complaint concerning imposition of unreasonable	**)**	
And anti-competitive termination charges by	**)**	
Illinois Bell Telephone Company.	**)**	

APPLICATION FOR REHEARING

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APPLICATION FOR REHEARING

Illinois Bell Telephone Company ("SBC Illinois" or "the Company"), by its attorney, hereby submits its Application for Rehearing in the above-captioned proceeding, pursuant to Section 10-113 of the Illinois Public Utilities Act ("Act"). 220 ILCS 5/10-113.

INTRODUCTION

TDS Metrocom, LLC ("TDS") filed the instant complaint in 2003 alleging that the charges that SBC Illinois assesses when its retail business customers terminate service agreements prior to the expiration of the contracted or tariffed term were unreasonable and anticompetitive. At the time TDS filed its Complaint, SBC Illinois' policies varied from product to product. Where the liability was based on a percentage of the payments that remained under the agreement, those percentages varied widely. TDS contended that all of SBC Illinois' termination liability provisions should be replaced with the approach it uses in its business and that the Commission ordered in the *Ascent* proceeding (i.e., the customer must return the discount that it did not earn).[1] *Order on Rehearing in Docket No. 00-0024*, February 20, 2002 at 35-37 ("*Ascent Order*").

At the outset of the proceeding, and prior to filing of TDS' Direct Testimony, SBC Illinois reviewed and rationalized its termination liability policies to make them more consistent across product families, based on accepted contract law principles. SBC Illinois made this change in policy clear to TDS (indeed, TDS referred to it in its Direct Testimony) and committed to implement it as soon as the necessary tariff, CLEC notification and other internal work could be completed. TDS Ex. 1.0 (Loch Direct) at 17-18; SBC Ill. Ex. 1.0 (Gillespie Direct) at 10-11, 14-15. TDS continued to litigate its Complaint, contending that its preferred approach should be imposed on SBC Illinois and that SBC Illinois' modified policies were still insufficient to satisfy its concerns. TDS Ex. 1.0 (Loch Direct) at 17-18; TDS Ex. 1.5 (Loch Rebuttal) at 2-7.

In the Commission's Order, SBC Illinois prevailed on the termination liability policy issue in all respects. The Commission concluded that SBC Illinois' modified policies were not unreasonable and were not anticompetitive. In fact, the Order concludes that the approach urged by TDS (i.e., "give-back-the-unearned-discount") was *not* competitively superior and should *not* be mandated for other carriers. *Order* at 18-19. The Commission's Order resolved this central issue in the proceeding appropriately and consistent with the record evidence.

However, the Order erred in one significant respect. In its Complaint, TDS sought reimbursement of attorneys fees and costs incurred in the prosecution of its Complaint under

[1] Under the approach advocated by TDS, the customer must pay back to SBC Illinois any unearned discounts it received over the term of the agreement that it completed, including any waived non-recurring charges. For example, assume that a customer enters into a 5-year agreement for Centrex service and breaches in month 37 (i.e. just after completing 3 of the 5 years). Since the customer had been paying the low 5-year rates, but only completed a 3-year term (for which separate rates are offered), the total charges to the customer would be recalculated based on 3-year rates and the customer would owe SBC Illinois the difference between what it paid and what it should have paid over that 37-month period. This was referred to in the proceeding as the "give-back-the-unearned-discount" approach. TDS Ex. 1.0 (Loch Direct) at 8-9.

Section 13-516(a)(3) of the Act. The Order properly concludes that TDS may not obtain attorneys fees and costs under Section 13-516 merely because its Complaint prompted SBC Illinois to change its practices. *Order* at 38. As the Order recognizes, the Commission must find a violation of Section 13-514 (i.e., "knowingly imped[ing] the development of competition" in a telecommunication market) to justify such an award. *Id.*; 220 ILCS 5/13-514, 516(a)(3). Notwithstanding the fact that SBC Illinois' prior policies were already moot by the time that testimony was filed in this case, the Order nevertheless concludes that these policies were, in fact, "anticompetitive and in violation of 5/13-514 of the Act." *Order* at 40 (Finding (9)). Based on that Finding, the Order awards TDS its attorneys fees and costs through March 4, 2004 (when the new policies were actually implemented).

It is wrong as a matter of law and inappropriate as a matter of policy for the Commission to make findings on issues that were moot. Moreover, there is absolutely no basis in the record for a conclusion that SBC Illinois' pre-Complaint policies were unlawful, and, therefore, the award of attorneys fees and costs to TDS cannot be justified.

ARGUMENT

I. SBC ILLINOIS' PRIOR TERMINATION LIABILITY POLICIES WERE MOOT AND SHOULD NOT HAVE BEEN THE SUBJECT OF FINDINGS IN THIS PROCEEDING

As referenced above, after receipt of TDS' Complaint, SBC Illinois undertook a thorough review of its termination liability policies. Prior to the filing of TDS' complaint, the Company's tariffs and contracts contained termination liabilities that varied widely by product and service: some were "forward-looking" (i.e., the liability was based on a percentage of the payments that remained on the contract), some were "backwards-looking" (i.e., the liability was based on the "give-back-the-unearned-discount" approach advocated by TDS) and the size of the liability differed widely. SBC Ill. Ex. 1.0 (Gillespie Direct) at 4-5, 9-10.[2] SBC Illinois announced its intention to replace this hodge-podge of policies with a consistent set of termination liabilities, based on appropriate economic analyses, before TDS filed its Direct Testimony. Under its new policies, all termination liabilities are "forward-looking" and the absolute amount of the percentage liability is now set at a consistent 25% for all Centrex services, 35% for all Usage services and 50% for all Data Transport and all Other services. There was no uncertainty among the parties or Staff that SBC Illinois would fulfill its commitment. And, in fact, it did so in March of 2004 (approximately three months later), during the pendency of the proceeding.

Therefore, from the *outset* of the evidentiary portion of this docket, SBC Illinois' pre-Complaint termination liability policies were moot. There was no question that they would not apply on a going-forward basis and, for that reason, the focus of the parties was on the new policies which SBC Illinois had announced. SBC Illinois' prior policies were also irrelevant to the affirmative relief proposed by TDS. TDS requested only that the Commission require SBC Illinois to replace its then existing policies with the "give-back-the-unearned-discount" approach on a going-forward basis.[3] TDS Init. Br. at 3-4.

In this circumstance, it is improper for the Commission to make any findings with respect to past policies. In effect, the Commission is issuing an advisory opinion on the matter – which lies outside the Commission's authority under the Act, which the Commission's rules do not permit and which courts in analogous circumstances have refused to do. See 83 Ill. Adm. Code § 200.220; *Order in Docket No. 98-0607* (Illinois Industrial Energy Consumers' Request for

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[2] These differences reflected the accumulation of individual product managers' decisions over a long period of time. *Id*. at 16.

[3] TDS also requested that SBC Illinois be required to calculate termination liabilities for CLECs, an issue on which TDS prevailed. However, the Order did not find that SBC Illinois' prior conduct was unlawful and, therefore, it is unrelated to the attorneys fees issue. *Order* at 26-27. SBC Illinois continues to believe that the Commission's conclusion on this issue is unreasonable and unnecessary. However, the calculation obligation is not being challenged in this Application for Rehearing.

Declaratory Ruling), adopted March 10, 1999; *Harrisonville Telephone Co. v. ICC*, 176 Ill. App. 3d 389, 392-93 (5th Dist. 1998); *Wheatley v. Board of Education of Township High School District 205*, 99 Ill. 2d 481, 484-85 (1984); *LaSalle National Bank, N.A. v. City of Lake Forest*, 297 Ill. App. 3d 36, 41-45 (2d Dist. 1998).

The Commission's conclusion is also ill-advised from a policy perspective. The public interest is clearly served when the respondent in a complaint proceeding takes proactive actions to address a complainant's concerns and such conduct should be encouraged. For similar reasons, settlement offers are always treated as confidential and may not be introduced as evidence in a proceeding in the event that settlement efforts ultimately fail. SBC Illinois took precisely that kind of proactive approach in this proceeding. For the Commission to then proceed to rule (and rule negatively) on SBC Illinois' superseded policies, even though they had become irrelevant to any contested issue in the proceeding, sends precisely the wrong message to companies subject to the Commission's jurisdiction and would disincent this kind of positive conduct.

II. THE EVIDENTIARY RECORD DOES NOT SUPPORT THE COMMISSION'S CONCLUSION

It is well established that the Commission's decisions must be based on substantial evidence in the record. 220 ILCS 5/10-201(e)(iv)(A). Decisions not supported by substantial evidence are arbitrary and capricious and will be set aside on appeal. *See Choate v. Ill. Comm. Comm.*, 309 Ill. 248, 257 (1923). The Commission's orders will also be reversed on appeal if they are inadequately explained. 220 ILCS 5/10-201(e)(iii), 5/10-201(e)(iv)(B)-(C). The need for substantial evidence to support any findings was underscored most recently in the reversal of the Commission's Order in SBC Illinois' Alternative Regulation Plan Review proceeding (Docket Nos. 98-0252/98-0335/00-0764), imposing capital spending obligations on SBC Illinois.

Illinois Bell Telephone Company v. Ill. Comm. Comm., No. 3-03-0207, slip. op. at 18-19 (3d Dist., 2004).

The Commission's conclusion that SBC Illinois' pre-Complaint termination liability policies were unlawful is not based on substantial evidence – indeed, in most instances, it is based on no evidence at all and even contradicts other conclusions in the Order. The Order's *entire reasoning* is as follows:

> The plain wording of the statute requires us to find that a telecommunications carrier "knowingly impede[d] the development of competition . . ." In the ASCENT Order, the Commission determined that termination penalties equaling the remaining revenue commitment were indeed impeding the development of competition. Thus, since the release of the Rehearing Order in the ASCENT case in February 2002, SBC has been aware of the Commission's view that very high percentage termination penalties are inherently anti-competitive, no matter what product is at issue. . .
>
> We find it appropriate to award fees and costs to TDS pursuant to Section 13-514 from the time of the filing of the complaint through March 4, 2004, when SBC began to implement termination revised penalties following the 25/35/50% schedule discussed above." *Order* at 38.

First, the *Ascent Order* cannot be relied on in this manner. It does not stand for the generic proposition that ". . . very high percentage termination liabilities are inherently anticompetitive, no matter what product is at issue." As the Order recognizes, the *Ascent Order* was very narrow in scope – involving only a handful of calling plans – and it was the product of a very specific time when competition was in its early stages. *Order* at 18. For example, the *Ascent Order* was based in substantial part on the fact that the services at issue had been introduced within weeks of the implementation of intraMSA prescription in 1996, when the Commission did not view customers as yet having meaningful choices. *Ascent Order* at 17. Market conditions are entirely different today: all of the services at issue in this proceeding are competitive and have been competitive for a considerable period of time; similarly, customers have a wide variety of choices and have had those choices for a considerable period of time.

SBC Illinois presented extensive market share and competitive history information for each product family, and this evidence is uncontroverted in the record. SBC Ill. Ex. 1.0 (Gillespie Direct) at 27-31. In addition, SBC Illinois did not present an economic analysis in the *Ascent* proceeding that would have justified its policies. It did so here.

Second, the *Ascent Order* invalidated termination liabilities at *100%* of what remained on the term agreement. *Order* at 18; *Ascent Order* at 17. In fact, SBC Illinois stopped using 100% termination liabilities in *2002*. SBC Ill. Ex. 1.0 (Gillespie Direct) at 8; SBC Ill. Ex. 1.1 (Gillespie Rebuttal) at 3-4. Although the termination liabilities in SBC Illinois' tariffs and contracts needed to be standardized at the time TDS filed its Complaint, *none* were at 100%. Below is a chart showing SBC Illinois' pre-Complaint termination liabilities for the three major categories of service at issue in this proceeding:

- *Usage*: either 35% or 50% of what remained on the agreement, depending on the calling plan

- *Data Transport and Other Products*: either "give-back-the-unearned-discount" or 50% of what remained on the agreement, depending on the service

- *Centrex*: 75% or 85% of what remained on the agreement, depending on the type of Centrex offering[4]

Therefore, none of these policies are, on their face, inconsistent with the *Ascent Order*, which invalidated 100% termination liabilities.

Third, this record simply does not permit a finding that these termination liability policies were, in fact, *unreasonable*. The Order itself finds a 35% policy for Usage to be lawful. *Order* at 18-19. Therefore, the Usage plans already using a 35% termination liability at the time the TDS Complaint was filed (i.e., the vast majority) were *per se* lawful. SBC Ill. Ex. 1.0 (Gillespie

[4] SBC Ill. Ex. 1.0 (Gillespie Direct) at 10-11, Sch. BG-2; TDS Ex. 1.0 (Loch Direct) at 19-20. Data transport products include services such as DS1, DS3, ISDN-PRI and private network offerings such as GigaMAN and SONET. SBC Ill. Ex. 1.0 (Gillespie Direct) at 12.

Direct) at 23. Although a few Usage plans had a 50% termination liability (SBC Illinois moved to this approach for tariffs in mid-2003 and had used it generally in ICBs), this approach is fully supported by SBC Illinois' economic loss analysis presented in this proceeding and Staff's informal guidelines used in industry workshops. SBC Ill. Ex. 1.0 (Gillespie Direct) at 20-21, 23; SBC Ill. Ex. 1.1 (Gillespie Rebuttal) at 5-6, 9-11. The Order accepts SBC Illinois' economic loss analyses as an appropriate benchmark for determining termination liabilities. *Order* at 19. In fact, SBC Illinois would have adopted a 50% termination liability policy for all Usage services, but for the "history" associated with the *Ascent Order*. SBC Ill. Ex. 1.0 (Gillespie Direct) at 23. This testimony is uncontroverted in the record. Therefore, there is *no* basis for finding either 35% or 50% unlawful for Usage services.

Data Transport and Other products were previously subject to either a "give-back-the-unearned-discount" methodology or a 50% termination liability policy. TDS and Staff *supported* use of the "give-back-the-unearned-discount" approach. *Order* at 8, 11. Although the Order found deficiencies in this methodology, it explicitly stated that TDS was free to use it in its agreements. *Order* at 19. Therefore, the same methodology cannot have been unlawful when used by SBC Illinois. The Order approves the other approach SBC Illinois had used for these products prior to the TDS Complaint – i.e., the 50% policy now being used for all Data Transport and Other products. *Order* at 18. Therefore, SBC Illinois' pre-Complaint 50% policy cannot be considered unlawful either.

The situation with respect to Centrex service is a little more complex. Centrex service is the one product family where the new termination liability (25%) is significantly lower than the prior termination liability (75%-85%). However, the record does not support a finding that the old policy was unlawful.

First, Centrex service does not bear any resemblance to the Usage plans at issue in the *Ascent Order* from a competitive perspective. Centrex has been competitive with PBXs since the late 1970s, and SBC Illinois had less than a 50% market share by divestiture in 1984. SBC Ill. Ex. 1.0 (Gillespie Direct) at 29. PBXs now represent *80%* of the marketplace for premises systems. *Id.* at 28.[5] Given this level of competition and choice, and in contrast to the customers at issue in *Ascent,* Centrex customers clearly assumed 75%-85% penalties in a "genuinely voluntary fashion," because they had "meaningful choice" and "sufficient bargaining power." *Ascent Order* at 22. This alone removes Centrex from the ambit of the *Ascent Order*.

Second, higher termination charges for Centrex can be justified based on economic considerations. As SBC Illinois explained, its new policy is based on economic analyses that assume that all of the underlying network costs incurred in providing a service are avoidable – in other words, that they can be immediately reused for another customer. SBC Ill. Ex. 1.0 (Gillespie Direct) at 22. This assumption is very conservative and biased in favor of the customer, because facilities freed up when a customer terminates an agreement may not be immediately reusable (or reusable at all). *Id.* From an economic perspective, costs associated with network facilities that are not reused can be included in the damages calculation. SBC Ill. Ex. 2.0 (Frankel Direct) at 26-27.

SBC Illinois could reasonably have made less aggressive assumptions about reuse for Centrex service. Between 2001 and 2003, lines (and profits) lost by SBC Illinois when customers migrated to CLECs were not offset by new demand, thus stranding the facilities used to provide service. The stranding of facilities when a customer moves from Centrex to a PBX is particularly acute, because Centrex requires many more loops than a comparably-sized PBX. Thus, the Company could have legitimately included network costs in determining its

[5] Although some CLECs provide Centrex service, they constitute a very small share of the overall marketplace. *Id.*

termination liability for Centrex during that period, justifying a 75% - 85% termination liability calculation. SBC Ill. Ex. 1.1 (Gillespie Rebuttal) at 5-6. There is no contrary evidence in the record. Therefore, SBC Illinois' 75%-85% Centrex termination liability cannot simply be analogized to the 100% policy rejected in *Ascent Order*. It is lower, and the facts supporting it are undisputed in the record. There would have to be *some* analysis, based on record evidence, to justify a contrary conclusion – and there is none in the Order.[6]

In short, based on the record in this proceeding, it is not possible for the Commission to conclude that the termination liabilities used by SBC Illinois prior to the filing of TDS' Complaint were unlawful.

III. ATTORNEYS FEES AND COSTS ARE NOT JUSTIFIED IN THIS PROCEEDING

The Commission must make a finding of *unlawfulness* under Section 13-514 of the Act to justify an award of attorneys fees under Section 13-516. The Order properly recognizes that the fact that a CLEC complaint results in pro-competitive action by an ILEC is not a trigger for awarding fees under Section 13-514.[7] *Order* at 38. It is well established that Section 13-516, like other fee-shifting statutes, must be strictly construed. *Globalcom, Inc. v. Ill. Comm. Comm. and Ill. Bell Telephone Co.*, Nos. 1-02-3605, 1-03-0068 Consol., slip op. at 36 (1st Dist. 2004). Thus, the issue is whether SBC Illinois' *current* policies are anticompetitive – and the Order concludes that they are not. If they are not violative of Section 13-514, then there is no basis for an award of costs to TDS. The Order cites to no authority that would permit the award of attorneys fees for conduct that is purely historical in nature and has no current application.

[6] SBC Illinois notes that the CLECs offering Centrex service charge between 75% and 100% termination liabilities. SBC Ill. Ex. 1.0 (Gillespie Direct), Sched. BG-3. SBC Illinois agrees that the conduct of other carriers is not *dispositive* of the reasonableness of its own policies. However, it is certainly *relevant*. *Order* at 38.

[7] SBC Illinois notes that the TDS Complaint did not *cause* SBC Illinois' change in policy – it simply accelerated a process that was already underway. SBC Ill. Ex. 1.0 (Gillespie Direct) at 17-18.

Attorneys fees may not be awarded for matters no longer in contention. See *Hillenbrand v. Meyer Medical Group, S.C.*, 308 Ill. App. 3d 381, 389-90 (1st Dist. 1999).

Moreover, even if a finding of unlawfulness could be made – which it cannot – there is no equitable basis for the award of attorneys fees and costs. Virtually the entire record was directed at the lawfulness of SBC Illinois' *new* termination liability policies, a point on which *SBC Illinois*, not TDS, prevailed. TDS could have stopped this litigation when SBC Illinois announced these changes in *December of 2003*. Instead, TDS continued to argue that the Commission should impose its "give-back-the-unearned-discount" policy on SBC Illinois – a position which the Order rejects outright. SBC Illinois should not be required to pay for litigation expenses incurred by TDS *disputing* the very policies that the Company defended and that the Order finds reasonable. In effect, the Order requires SBC Illinois to finance its competitor's pursuit of a meritless position. This outcome represents bad public policy and is inconsistent with the very purpose of awarding attorneys fees.

Further, the Commission's Order is internally inconsistent. Since the pre-Complaint policies are no longer in effect, the award of attorneys fees and costs required by the Order has exactly the same effect as awarding TDS attorneys fees for prompting pro-competitive action by SBC Illinois – simply under another label. The Order recognizes that such a result is *not* legally proper if done directly, and it is not any more legally proper if accomplished indirectly. *Id.* at 38.

CONCLUSION

The Commission should approach any negative findings under Section 13-514 with appropriate caution. As this Commission is well aware, the telecommunications industry is extremely litigious. Although the findings regarding the termination liability policies used by SBC Illinois prior to the filing of TDS' Complaint have no operative effect in this proceeding other than to justify the award of costs to TDS, they could take on greater significance in other contexts. Under the circumstances of this case and given the absolute lack of evidence supporting the Commission's conclusions, no finding of unlawfulness could or should have been made and no attorneys fees or costs could or should have been awarded to TDS. The Commission's Order should be modified as recommended herein.

Respectfully submitted,

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____

One of Its Attorneys

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CERTIFICATE OF SERVICE

I, Louise A. Sunderland, an attorney, certify that a copy of the foregoing **APPLICATION FOR REHEARING** was served on the parties on the attached service list by U.S. Mail and/or electronic transmission on October 8, 2004.

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